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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 187

JOEL A. MALOY and RUTH MALOY, his wife,
Petitioners,

vs.

FIRST FEDERAL SAVINGS AND LOAN ASSOCIATION OF WEST PALM BEACH, a corporation existing under the laws of the United States of America,
Respondent

PETITIONER'S REPLY BRIEF TO RESPONDENT'S MEMORANDUM

JOEL A. MALOY,
RUTH MALOY,
Petitioners,
405 S. E. 4th Avenue,
Delray Beach, Florida.

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Respondent would have this Court believe that the $21.29 mentioned in the opening paragraph and repeatedly throughout its memorandum, was merely a miscalculation which petitioners used as an excuse for failure to pay installments due under an amortizing home mortgage. Hence no Federal question involved.

Not only is a Federal question involved, the decision sought to be reviewed has no precedent in the history of law. There no case where a man accused of stealing a horse, tried and convicted of stealing a cow. That is the case here. Accused of default for failure to pay installments due on promissory note secured by mortgage sought to be foreclosed, petitioners tried and convicted for failure to pay installments due on ACCOUNT CARD, attached to and by reference made part of Motion for Summary Final

Decree and supporting affidavit (R. 19-20) granted by Trial Court. (R. 25) A fact respondent carefully failed to mention. Original promissory note and mortgage sued on not offered in proof of default, are not before this Court.

Statement of the Case

In a desperate attempt to prove its point, considerable liberty is taken of the record in Respondent's Statement. Each and every one contradicted by the record, as follows.

First; Answer to the complaint specifically denied allegations of default for failure to pay installments due on promissory note and taxes, states: "Defendants deny the allegations of paragraph 2 of the Complaint." (R. 7)

And there stands uncontradicted affirmative defenses of no defaults because of substitution in place of promissory note and its provisions for payment of installments due, the Account Card and its rules for payment to Respondent's advantage and taxes paid without notice to compel payment. The promissory note dated Feb. 14, 1956 in principal sum of $4,586.24 provides for monthly installment payments of $45 each, interest at 6% per annum and a *30 days grace period*. (R. 4) The Account Card rules allow among other things, charging of interest on interest if payment 10 days late, of which Respondent advised in letter of July 7, 1957.

(Photostatic copy attached to Answer as Exhibit "D" R. 16)

Petitioners not advised of such substitution until repeated requests in letters of May 7 and June 10, for prompt correction of excessive $4,276.30 balance, so as to pay May 20 installment, shown due in book furnished at time of signing promissory note after payment of April 20, installment, paid by check inadvertently dated April 30

when mailed instead of $4,255.01, *an excess of $21.29*, and proper crediting of $90 check: (Exhibit "A" R. 14)

Date	Interest charged	Payment	Balance
Feb 20-57	Y**21.63	Feb & Mar L***90.00	4,257.12
Mar 29			
May 1-57	**21.29		4,278.41
Apr 30-57	**21.39		4,278.51
May 1-57	**21.50	L***45.00	~~4,255.01~~
May 1-57	A***0.00		4,276.30

Respondent ignoring request, first threatened foreclosure unless May 20 installment paid and advising taxes paid (not paid having been tripled and permission given to seek reduction along with other indignant citizens) in letter of June 7, said:

> "My attention has been directed to the fact that your May Mortgage Loan payment of $45 due on the 20th of May has not been received at this office. I must assume that this is an oversight on your part as I am certain you would not wish to place your property in jeopardy due to failure to meet your mortgage loan payments. The situation is complicated by the fact that you also did not pay the 1956 * taxes. So the Association paid these taxes for you. These taxes * were paid on June 3 and charged to your *mortgage loan account*. (Emphasis added. Photostatic copy Exhibit "C" R. 15)

Finally, but first again threatening foreclosure, respondent in said letter of July 7 advised the $4,276.30 is balance due on the Account Card; *all prior and future installment payments paid and required to be paid on and pursuant to its rules for payment*; it was *believed loan had been allowed to go into default because of a misconception as to the proper method of posting accounts and* of the rules under which April 20 installment paid by check inadvertently dated April 30 an "omitted payment" and not

credited until May 1, so as to charge as of April 30 and May 1 unauthorized interest on interest of $21.39 and $21.50, said:

> "*This account is now in default* * *. You may if you wish bring this mortgage current by paying the omitted installments and taxes *. This should be done immediately as it is our intention to send this account to our attorneys' office for collection in which event you will then become liable for attorneys fees and other costs, including possible foreclosure costs. We have reviewed the entire file and believe your have allowed this loan to go into default because of a misconception on your part as to the proper method of posting accounts. *The method of posting used by the Association follows these two rules among others.* (Emphasis added)
>
> 1. The amount posted in the last column of your payment book is the balance of the loan as of the first day of the month shown in the first column. This balance does not include interest accrued since the first of the month.
>
> 2. Interest accruing for a particular month is not added to the account until the next succeeding month when a payment is made; if no payment is made during the next succeeding month the interest is added on the last business day of such next succeeding month. *This method takes care of pre-payments as well as omitted payments.* (Emphasis added)
>
> *The April, 1957 payment being omitted*, the interest for the month of March in the amount of *$21.39* was added to the account on April 30, 1957 and the *resulting balance $4,299.80* was the balance as of April 1, 1957. *The April, 1957 payment* in the sum of $45.00 was *made on May 1, 1957*. Interest for the month of April in the amount of *$21.50* was added to the account at this time and the *resulting balance $4,276.30* was the balance as of May 1, 1957. (R. 7 thru 13)

Respondent continued to threaten foreclosure in Letter of July 22, stating *Account* turned over to attorneys, who

in turn in letter of July 29 threatened foreclosure unless installments due on *Account* and taxes paid. (Photostatic copies "E" and "F" R. 18) Payment on the *Account card* refused, suit filed August 15, 1957, to compel payment or acquire property by way of suit in equity.

SECOND: Respondent's Motion for Summary Final Decree claiming default for admitted failure to pay installments due on ACCOUNT CARD, states:

> "It is contended by defendants that their failure to make payments of installments subsequent to the installment due April 20, 1957 was occasioned by an improper posting of interest to the account. * * and defendants assign this alleged error as an excuse for their failure to make payment of installments. *The disputed balance of $4,276.30 is the result of mathematical calculations based upon the date of said promissory note, the original balance* * *. Attached is a copy of the account card * * pertaining to this account and an affidavit by MARGARET M. PETERS *. *An examination of the affidavit and account card shows the balance of the account as of May 1, 1957 is in fact $4,276.30.* (Emphasis added R. 19)

And the attached affidavit avers:

> " * *; that attached hereto is a copy of the account card * pertaining to the account of JOEL A. MALOY and RUTH MALOY * which is involved in the instant suit; that said copy shows the status and history of said account from its inception; affiant further says that the *balance of said account as of May 1, 1957 was $4,276.30.*" (Emphasis added. R. 20)

THIRD: Order for Summary Final Decree finding default for admitted failure to pay installments due on the ACCOUNT CARD, states:

> "(3) That the said defendants are in default for failure to pay any installments of said promissory note subsequent to the installment due April 20, 1957. The said defendant admits that such payments have

not been made but contend that failure to make such payments was occasioned by plaintiff's improperly posting interest to the account. *The Court has examined the affidavit* made by the Treasurer of plaintiff and the *attached copy of the plaintiff's account card pertaining to this mortgage* and finds no error in the calculations. The failure of plaintiff to credit the check dated April 30, 1957 until May 1, 1957 will be disregarded as the check was post-dated when sent to plaintiff which necessitated its being handled out of the ordinary course of business.

(4) That the said defendants are in default for failure to pay the 1956 taxes due to the City of Delray Beach on the mortgaged property which taxes were paid by the plaintiff on June 3, 1957. (Emphasis added. R. 26)

Federal Question Sought To Be Reviewed Raised Below

Here again in stating Federal question not raised below, Respondent takes leave of the record. The "countless papers" respondent refers to as being filed to eliminate the $21.29, so erroneous and preposterous it is wondered if it is talking about same record, or substituted another, as it did the ACCOUNT CARD. Also its statement that it was not until the filing in the District Court of "Motion for Rehearing" was it claimed that "*Federal due process had somehow been violated by the trial court's consideration of the account card.*"

With such a record there is no doubt but that Federal question sought to be reviewed was raised and passed on by trial and appellate courts; as to whether or not the trial court departed from the accepted and usual course of judicial proceedings in holding a mortgagor failing to pay on mortgagee's ACCOUNT CARD and pursuant to its tricky fraudulent and deceitful rules to its advantage, mortgagor in default in payment of installments due on promissory note secured by mortgage sought to be fore-

closed and of taxes, paid to compel payment on the ACCOUNT CARD.

Trial Court considered Petition for Rehearing on ground it departed in such findings and Order denying "Ratified and confirmed" Order for Summary Final Decree. (R. 41).

District Court considered Assignments of Error (R. 42). Brief and transcript on same ground and one word Opinion affirmed trial court, thereby denying respondent attorneys fees to which it entitled if petitioners in default. (R. 49). Petition for Rehearing (R. 49) on same ground and that such findings denial of constitutional guarantees of trial by due process of law, State and Federal. In addition pointed out that Court failed in the interest of justice to apply one of its own rules;

> "It is believed that this Court omitted in the interest of justice, to find applicable one of its rules, to-wit: Rule 3.7(i) providing:
>
> "* * However, the Court in the interest of justice may notice * * fundamental error apparent in the record-on-appeal, whether or not it has been argued in the briefs or made the subject of an Assignment of Error."
>
> And, it apparent in the record-on-appeal in this cause that your petitioners are not alleged, proved or found in default for their failure and refusal to pay installments due on the note secured by mortgage sought to be foreclosed, or of taxes, yet are held to be in default and their property ordered taken from them, petitioners have been denied those inalienable rights guaranteed in and by the Constitution of the State of Florida, Section 4 of the Declaration of Rights providing:
>
> 'All courts in this State shall be open, so that every person for any injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice shall be administered without sale, denial or delay.

And the Constitution of the United States, Amendment XIV Section 1, providing:

> "* *; nor shall any State deprive any person of life, liberty or property without due process of law, nor deny any person within its jurisdiction the equal protection of the law. (R. 53)

Supreme Court considered the Petition for Writ of Certiorari in which included above paragraph as among facts submitted to District Court, in compliance with suggested form—and its Order states: "* *and the record having been inspected.*" (R. 22)

Respondent attempts to prove its point by quoting only portions of Petition for Rehearing filed in District Court, Petitioners of course referring to the fact that State and Federal law requires that allegations of complaint be proved at hearing on bill and answer, unless admitted, in stating respondent attempted to prove default for failure to pay on the ACCOUNT CARD. Its next quotation is preliminary to the one above. And respondent's repeated reference to "Motion for Rehearing" appears because its one cited case is where this Court denied Motion for Rehearing, in no way applicable here.

Cognizable Federal Claim Asserted

In final effort, Respondent claims this Court barred from consideration of a state court's departure from the accepted and usual course of judicial proceedings under Rule 19 (1)(b). The same rule(2) provides: "The same general consideration outlined above will control in respect * * of any other courts whose determinations are by law reviewable on writ of certiorari."

Petitioners Denied Federal Due Process of Law

Record speaks for itself, we say in reply to Respondent's statement petitioners not denied Federal due process of law. And this Court should ask: Why no attempt to prove

default for failure to pay on the note and mortgage. Answer, respondent only interested in court's approval of substitution of the ACCOUNT CARD. We have nothing to fear of foreign country where a mortgagee can compel mortgagor to pay installments due on an ACCOUNT CARD or any other paper substituted for promissory note and whatever rules enforced, or lose home. And in view of respondent's position point out that Regarding its Method of posting accounts *there also stands uncontradicted this statement in the Answer:*

> "13. *That plaintiff's methods of transacting business is generally known and recognized as a 'racket' and defendant Ruth Maloy now understands the remarks with reference thereto, by one party indignantly as a plain 'racket' and another as the 'sweetest racket in West Palm Beach'*". (R 13)

Conclusion

The Petition should be granted. It raises a Federal question.

To say it does not, is to say the sun rises in the West. And a citizen fighting for his rights under the Constitution of the United States guaranteeing trial by due process of law, frivolous.

Respectfully submitted,

JOEL A. MALOY,
RUTH MALOY,
Petitioners,
405 S. E. 4th Avenue,
Delray Beach, Florida.